In the Supreme Court

OF THE

United States

NOV 24

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Petitioners,

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW, and FREDERICK STOW.

Petitioners' Brief on the Merits on Certiorari to the Supreme Court of the State of California.

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COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW, and FREDERICK STOW.

Petitioners' Brief on the Merits on Certiorari to the Supreme Court of the State of California.

REPORT OF THE OPINION BELOW.

The opinion in the Supreme Court of the State of California (R. p. 117 et seq.) is reported in 299 Pac. Rep. 75; 81 Cal. Dec. 652; not yet reported in California Reports.

There were three other opinions filed in the Supreme Court of the State of California, written by three several justices of the District Court of Apepal for the Third Appellate District, but only one of these, adopted by the Supreme Court, with slight modifications, appears in the record, the other two apparently not being regarded by the Supreme Court as part of the record herein. (R. p. 116, fol. 185; p. 119, fol. 188.)

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The purpose of paragraph one of Rule 12 of this court is accomplished in the petition herein and the brief in support thereof. The action, under state statute, involves title and right of possession to a railroad right of way claimed by petitioners under the special federal grant of July 1st, 1862 (12 Stat. 489), entitled "*An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes*". The court below, recognizing that title, has, nevertheless, contrary to applicable decisions from this

court, held (a) petitioners' rights qualified and impaired by the general right of way grant made by federal statute, approved March 3rd, 1875 (18 Stat. 482) (R. p. 131, fol. 197). (b) The state tribunal has also held this right of way granted by special act of Congress subject to the police power for highways encroaching longitudinally over long distances. This, also, is contrary to applicable decisions of this court (R. p. 126, fol. 193; p. 128, fol. 195). (c) the court below has also held this right of way subject to highway rights by adverse user, likewise contrary to applicable decisions from this court (R. p. 134, fol. 199).

The case is therefore reviewable under section 237(b) of the Judicial Code; U. S. C. A. Title 28, Section 344(b); *Jordan v. Tashiro,* 278 U. S. 123; *Grayson v. Harris,* 267 U. S. 352; *Knights of Pythias v. Meyer,* 265 U. S. 30; *Dana v. Dana,* 250 U. S. 220; *Erie R. R. Co. v. Hamilton,* 248 U. S. 369; *Carlson v. Curtis,* 234 U. S. 103; *Gauthier v. Morrison,* 232 U. S. 452; *Southern Pacific Co. v. Schuyler,* 227 U. S. 601, 611; *Missouri Valley Land Co. v. Wiese,* 208 U. S. 234; *Same v. Wrich,* Id. 250; *Green Bay etc. Canal Co. v. Patten Paper Co.,* 172 U. S. 58; *Northern Pacific R. Co. v. Colburn,* 164 U. S. 383.

This court has already considered these preliminary matters on petition for the writ. We cite again pertinent cases from this court and from the lower federal courts with which the state court's opinion is inconsistent, and which we think fully sustain petitioners'

position on all three grounds urged (*Nor. Pac. R. R. v. Smith*, 171 U. S. 261, 275; *Northern Pacific Ry. v. Townsend*, 190 U. S. 267; *Williams, Mayor, et al. v. Atlantic Coast R. R. Co.*, 17 Fed. (2d) 17; *H. A. & L. D. Holland Co. v. Nor. Pac. Ry. Co.*, 214 Fed. 920, 926; *Jones on Easements*, Sec. 281, p. 232; *Sinking Fund Cases*, 99 U. S. 700, 719, 757; *Railway Co. v. Alling*, 99 U. S. 463, 479; *United States v. Denver & Rio Grande Ry.*, 150 U. S. 1, 10).

STATEMENT OF THE CASE.

(1) *The Issue, Its Technical Nature and Practical Effect.*

(2) *The Facts.*

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(1) THE ISSUE, ITS TECHNICAL NATURE AND PRACTICAL EFFECT.

The issue is simply one of title and right of possession; whether the railroad company or the county has the superior right and control within the conceded boundaries of the railroad right of way. The practical effect of the issue, as decided below, is to subordinate the railroad company to the will or the whim of the county whenever the railroad company may find it necessary or expedient to improve or revise its alignment or extend its facilities within the boundaries of the right of way. The highway in places approaches within a few feet of the ends of the ties (see Exhibit R. p. 40A, fol. 70a).

(2) THE FACTS.

The facts supporting petitioners' contentions are found substantially in their entirety by the trial court, whose judgment was affirmed by the State Supreme Court. The transcontinental right of way, of which this is part, was an economic and defensive national necessity (*U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, 79). The present location of the track was proven to be coincident with the center line of right of way as originally located and the trial court has found (R. p. 23, fol. 38):

> "That plaintiff Central Pacific Railway Company is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land."

Then follows the description of six parcels of land designated as A, B, C, D, E, and F, embracing all highway areas described in the complaint. The findings then continue (R. p. 26, fol. 45):

> "That the aforementioned railroad right of way, embracing the foregoing particularly described parcels of land is a part of the right of way granted to Central Pacific Railroad Company of California by Act of Congress approved July 1, 1862, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to

the Government the use of the same for postal, military and other purposes.' (12 Stat. 489.) That plaintiff Central Pacific Railway Company is successor in title to Central Pacific Railroad Company of California by successive corporate consolidations and by mesne conveyance."

It is next found as a fact (R. p. 27, fol. 46) that the entire area was on July 1, 1862, unappropriated public land of the United States; that the railroad was fully constructed as required by the act and accepted by the President of the United States on behalf of the government.

Two of the parcels of highway, identified in the judgment as parcel A and parcel B lie in flat open country, and the judgment awarded petitioners possession of those parcels. Parcel C is an unimportant branch at the westerly end of the canyon hereinafter mentioned, and the trial court also awarded petitioners possession of that parcel. Parcels D, E and F constitute part of the existing highway through a pass in the hills of the respondent Alameda County, known as Niles Canyon. Parcels D, E and F have their terminals on the right of way boundaries and are connected by other portions of the highway lying outside of the right of way boundaries. This is illustrated by plaintiffs' Exhibit No. 6 (inserted R. p. 40A, fol. 70a).

The topographic conditions at the foundation of the conclusion adverse to petitioners are illustrated by Defendants' Exhibit D (inserted R. p. 84A, fol.

132a). This is a portion of topographic sheet of the Pleasanton Quadrangle, United States Geological Survey. The pass is there identified as Alameda Canyon.

Prior to the right of way grant the County of Alameda caused a survey to be made for a highway route through this pass. A survey was made by the County Surveyor with that degree of precision in vogue at the time, and a plat of his survey was approved and adopted by the Board of Supervisors. The route lay throughout its entire distance through the pass on the northerly side of Alameda Creek (Defendants' Exhibit B, inserted R. p. 60A, fol. 98a). There are several crossings in the present highway. The highway route thus adopted in 1859 was known as Road Survey No. 247. There was no evidence of construction on that line of route. On the contrary there was no highway construction through the pass entirely on the north side of the creek. The Geologic Survey (Defendants' Exhibit D, R. p. 84A, fol. 132a), was made in 1904. It shows four crossings of the creek in a little more than a mile of highway. One crossing is shown by Plaintiffs' Exhibit No. 6 (R. p. 40A, fol. 70a) in approximately the location shown on the topographic sheet, a short distance east of Farwell. In other respects no existing crossings are shown in the locations exhibited on the topographic sheet.

There is some testimony of old residents of the region, whose recollections, however, do not extend

back of the railroad grant. Their testimony, taken for what it is worth, indicates that it was possible in the early sixties to traverse the canyon, at least when the water was low, when the creek bed itself served in large part as a passage way.

Israel Richards penetrated the canyon part way, but not entirely, the latter part of 1863 or early in 1864 (R. p. 70, fol. 112). They used to ride through on horseback sometimes and hunt up that road, traveling in the creek bed mostly at certain points (Id. fol. 113).

G. W. Buttner first made the trip through the canyon in 1862 or 1863. He went perhaps once a month in the summer time, but not in the winter (R. p. 72, fols. 115-116). They traveled at one point "where the present railroad is". "Then they came right down, just followed the creek right along until we got pretty near opposite where the present Western Pacific large tunnel is * * * the Long crossing" (R. p. 74, fol. 119) * * * "then we went along there I guess for about five hundred yards and then we had to cross back again, from this point we crossed back over the creek to that side. That was quite a long crossing also" (R. p. 75, fol. 120).

The trial court found that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with the county road as now existing, or whether the highway actually traveled prior to the adoption of the present route followed the line of Survey 247 for any distance whatever (R. p. 29).

SPECIFICATION OF ERRORS ASSIGNED.

1. The State Supreme Court erred in holding that the Act of July 1, 1862, was retroactively amended and qualified by the Act of March 3rd, 1875, as to petitioners' vested title (R. p. 131, fol. 197).

2. The State Supreme Court erred in holding that the police power of the state extends to the appropriation of longitudinal strips of land within the boundaries of the right of way 400 feet in width granted by the Act of July 1, 1862 (R. p. 126, fol. 193).

3. The State Supreme Court erred in holding that respondents had acquired the right by adverse user to maintain a county road paralleling and within the boundaries of the railroad right of way granted by the Act of July 1, 1862 (R. p. 134, fol. 199).

4. The court erred in holding that the respondent County of Alameda could acquire any highway right prior to the highway grant of July 26, 1866 (R. S. Sec. 2477); or that it could acquire any license which was not defeated by the Act of Congress approved July 1, 1862 (R. p. 124, fol. 192).

5. The court erred in holding that the way traveled through Niles Canyon at or prior to the time of the railroad right of way grant was ever adopted by the board of supervisors of Alameda County as a public highway (R. p. 119, fol. 188; p. 123, fol. 191).

SUMMARY OF THE ARGUMENT.

1. *Petitioners' Right of Way Title Vested under Congressional Grant on July 1st, 1862. The State through Its Legislature Disclaimed All Interest in that Strip of Land by Acts Approved May 1, 1852 and April 4, 1864. Alameda County, a Political Subdivision of the State, Cannot be Heard in Repudiation.*

2. *The Effect of the Act of Congress Approved March 3, 1875* (18 Stat. 482) *as Amendatory of Special Grants theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It Was Not Within the Intent or the Power of Congress to Impair Vested Title.*

3. *The State Police Power and the Power to Acquire Highway Rights by Adverse User Could Not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920* (14 Stat. 621), *the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.*

4. *There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years thereafter. In the Mean Time the 400 Foot Strip Was Granted by Congress and Dedicated to the Public Service of a Railroad Right of Way. The Way Used Prior to July 1, 1862, Was Never Adopted by the County of Alameda.*

ARGUMENT.

I.

PETITIONERS' RIGHT OF WAY TITLE VESTED UNDER CONGRESSIONAL GRANT ON JULY 1st, 1862. THE STATE THROUGH ITS LEGISLATURE DISCLAIMED ALL INTEREST IN THAT STRIP OF LAND BY ACTS APPROVED MAY 1, 1852 AND APRIL 4, 1864. ALAMEDA COUNTY, A POLITICAL SUBDIVISION OF THE STATE, CANNOT BE HEARD IN REPUDIATION.

It is one thing to consider the convenience, or even the necessity, of the County of Alameda under present conditions; it is another and vastly different thing to consider the necessities, not only of the County of Alameda but of the entire State of California, the Pacific slope in general and the entire Union in that earlier period to which we must look for the determination of disputed rights, whether legal or equitable.

The state of the nation at that period with relation to conditions prompting the grant of July 1st, 1862, are vividly reflected in the opinion of this court in *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 79:

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of

our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occuping them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise."

The State of California was vitally interested in this project, the urgency of which had been recognized by its legislature for more than a decade. This is demonstrated in the Act of the State Legislature approved May 1, 1852, which is in words following:

"An Act to grant the right of way to the United States for railroad purposes. Approved May 1, 1852, 150.

"Whereas, The interests of this State, as well as those of the whole Union, require the immediate action of the government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purpose of national safety, in the event of war, and to promote the highest commercial interests of the republic; therefore,

"The people of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific Oceans (Ocean)."

The federal government required no grant from the State for a railroad right of way over federal government lands. Nevertheless, the state Act of 1852 constitutes a definite disclaimer of any adverse interest. Twelve years later, and after the federal grant, the state legislature, either assuming that its consent was necessary, or wishing to register its good will toward the project, enacted a further statute, approved April 4, 1864, entitled "An Act to aid in carrying out the provisions of the Pacific Railroad and Telegraph Act of Congress, and other matters relating thereto", * * * "hereby confirming to and vesting in said company

all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said Act of Congress" (Stats. 1863-1864, p. 471).

Whatever the purpose, the act has the legal effect of a further disclaimer, which the state legislature has never assumed to deny. Nor could it impair the authority of the federal courts to grant a right of way for railroad construction over federal lands in the State of California. In point is the language of the Circuit Court of Appeals for this circuit in *City of Reno v. Southern Pacific Company,* 268 Fed. 751, 759:

> "It is said that the Central Pacific, having been a California corporation, had limited powers, and could not, at the time of the passage of the act of 1862, transact business or take lands in Nevada. But we are convinced that it was within the jurisdiction of Congress to grant the right of way through the territory of Nevada at the time of the passage of the act of 1862, and that the exercise of such power was not dependent upon legislative action by the State of California or the State of Nevada. Van Wyck v. Knevals, 106 U. S. 360, 369, 1 Sup. Ct. 336, 27 L. Ed. 201."

We give only passing notice to the Act of April 4, 1864, because its legal effect is nil, and the only aid it gives to appellants' argument is its tendency to show that the state legislature endorsed all that Congress had done by the Act of July 1, 1862.

In concluding this head we revert to the finding of the state trial court (R. p. 27) that the entire area involved in this proceeding was on July 1, 1862, unappropriated public land of the United States; that the railroad was fully constructed as required by the act and accepted by the President of the United States on behalf of the government. Under the authority of the leading case of *Railroad Company v. Baldwin,* 103 U. S. 426, the facts found vested title in the railroad company as of the date of the grant. This, in fine, the state courts have concluded; but they have assumed to find a qualification in that title by conditions which we shall consider.

II.

THE EFFECT OF THE ACT OF CONGRESS APPROVED MARCH 3, 1875 (18 STAT. 482) AS AMENDATORY OF SPECIAL GRANTS THERETOFORE MADE BY CONGRESS HAS BEEN CONSIDERED BY THIS COURT FAVORABLY TO PETITIONERS' CONTENTION. IT WAS NOT WITHIN THE INTENT OR THE POWER OF CONGRESS TO IMPAIR VESTED TITLE.

This head of argument treats of the first specification of error; which specification is predicated upon that conclusion of the trial court, cited and approved by the Supreme Court (R. p. 121, fol. 190):

> "The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now

occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482), declaring "and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road."' "

The opinion adopted by the State Supreme Court, written by Mr. Justice Knight of the First District Court of Appeal, but which did not receive the concurrence of his associates, does not expressly recognize the controlling effect of federal interpretation of these federal acts. It does find novelty in the federal issue, where the opinion recites (R. p. 124, fol. 192):

> "These acts have been construed at different times by the federal and state courts, and while no case identical in facts to those here presented has been cited, the legal principles employed in those cases in measuring the extent of the title granted by said acts must necessarily be applied here in determining the rights of the respective parties."

The opinion purports to find precedent in a state court decision for the vulnerability of these special government-granted right of way titles; *North Coast Railway v. Northern Pacific Railway Company,* 48 Wash. 529 (94 Pac. 113). But that decision is explained by the late Judge Rudkin, who participated in it, and who decided the Holland case in the United States District Court, holding that such rights of way are immune from the police power of the state in the matter of longitudinal highway encroachment. We shall revert later to these cases.

The views of this court have been definitely expressed. Perhaps the first case presenting the issue as to the relation of the Act of March 3rd, 1875, to railroad rights of way theretofore granted by special act is found in *Railway Co. v. Alling* (October Term 1878) 99 U. S. 463. That case had to do with the following facts:

Congress on June 8, 1872 (17 Stat. 399) granted to Denver and Rio Grande Railway Company a right of way, conditioned that the grantee should complete

its road to a point on the Rio Grande as far south as Santa Fe within five years, and complete each year thereafter fifty miles additional south of that point. The road was not completed to Santa Fe within the allotted period, and on March 3, 1877 (19 Stat. 405), Congress amended the grant of June 8, 1872, extending the period to ten years from the original act to complete the road as far south as Santa Fe. In the meantime, and after the approval of the Act of March 3, 1875, Cañon City and San Juan Railway Company asserted its claim under the latter act to occupy the Grand Cañon of the Arkansas. Mr. Justice Harlan, expressing the opinion of the court, said at page 479:

> "Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Cañon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th of April, 1878, to take possession of the Grand Cañon, and

prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the act of March 3, 1877, it must be held to have assented to the provisions of the act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the cañon, for the purpose of its road, in common with the road first located."

The reasoning of the court necessarily accepts the hypothesis that the Denver Company by reason of its default had no rights whatsoever in the Grand Cañon of the Arkansas on March 3, 1875. Congress could and did waive the forfeiture and imposed upon the grant the further restrictions of the Act of March 3, 1875.

Our construction of this decision is reinforced by the opinion in *United States v. Denver & Rio Grande Railway,* 150 U. S. 1. In that case the government challenged the right of Denver & Rio Grande Railway Company to avail itself of the incidental benefits of the Act of March 3, 1875, because the company having accepted the special grant of June 8, 1872, subsisting at the time of the passage of the Act of March 3, 1875, could not rightfully claim the benefits of the latter act. The court said, at page 10:

"In that case the Denver Company (the defendant in error here) had in 1871 and 1872 merely made a preliminary survey of its line through the Grand Cañon of the Arkansas, but

had postponed the actual location and final appropriation of its roadway through that defile until April, 1878, at which date it was subject to the provisions of the act of 1875, (the second section of which conferred upon other roads the right, upon certain terms and conditions, to use its track or roadway through such defiles,) for the reason that after the passage of that act the Denver Company had accepted the benefit of the act of March 3, 1877, extending the time for the completion of its road to Santa Fe, which extension the court assumed would hardly have been given by Congress except subject to the conditions contained in the act of 1875. Being subject to the provisions of the law, as contained in the second section of the act of 1875, while in the exercise of its rights under the act of 1872, as amended by the act of 1877, in no way prevented the railway company from complying with its conditions and securing the benefits conferred by the first section of the act of 1875."

Otherwise expressed, the right of way grant to the Denver Company was in a sense executory on March 3, 1875, by reason of condition broken. The grantee was bound to accept its new privileges subject to existing law. But such is not the case before this court. Here there was no breach of condition, no failure to perform on the part of the railway company. The road was constructed long prior to the Act of March 3rd, 1875.

For the controlling principle under this head we may go back to the summary statement of the rule by

Mr. Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 719.

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

So far as we have discovered there is no case from this court involving a right of way title fully vested prior to the Act of March 3, 1875, but the applicable principles of law seem to lead inevitably to the conclusion that the Act of March 3rd, 1875, can have no possible effect on a right of way title fully vested under special grant.

Under this point that the Act of March 3rd, 1875, cannot be given a retrospective operation, the opinion in this case refers to the Act of Congress approved June 24, 1912 (37 Stat. 138), and cites the cases of *Union Pacific Railroad Co. v. Laramie Stock Yards*, 231 U. S. 190, and *Union Pacific R. R. Co. v. Snow*, Id. p. 204, and the opinion erroneously declares the effect of these decisions as follows:

> *"On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unusued portions of the rights of*

way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged." (R. p. 132, fol. 197.)

This court distinctly held, *contrary to the opinion of the state court,* that to give the Act of June 24, 1912, a retroactive effect "*may incur the opposition of the constitution*" (231 U. S. 200). The opinion of the state court goes on to say (R. p. 133, fol. 198):

> "But in neither case was it held, as appellants contend, that the provisions of the act of 1912 were inoperative and ineffectual against rights of way previously granted under the act of 1862; and indeed such a conclusion would have been directly contrary to the very purpose and the express language of the 1912 act. It follows therefore, that if in 1912 Congress had power to enact valid legislation controlling the right of possession to unused portions of rights of way granted by the government under the act of 1862, it was surely vested with the same power in 1875."

Petitioners respectfully submit that they did not contend that the Act of 1912 was *inoperative.* We contended that it was not *retroactive.* We contend also that the Act of March 3rd, 1875, is utterly devoid of phraseology or intent empowering railroad companies to convey, or public bodies to acquire by adverse possession. Whatever rights are conferred by the Act of March 3, 1875, are conferred directly by Congress, *not intermediately through any railroad*

grantee; and we have seen *by Railway Co. v. Alling* and *United States v. Denver & Rio Grande Railway Co.,* supra, and by the clearcut statements of Mr. Chief Justice Waite and Mr. Justice Field in the *Sinking Fund Cases,* that the Act of March 3rd, 1875, could not have any effect as an amendment of the grant of July 1, 1862 (99 U. S. 700, 719, 757). Had Congress intended to confer powers of alienation or dedication, either directly, or constructively by adverse possession, it is only fair to presume that Congress would have said so in unmistakable language, as it did in the Act of May 25, 1920 (41 Stat. 621), the language of that act being:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained."

The highway here in many places would not leave such width for railroad operation (see map R. p. 40A, fol. 70A).

III.

THE STATE POLICE POWER AND THE POWER TO ACQUIRE HIGHWAY RIGHTS BY ADVERSE USER COULD NOT EXTEND BEYOND THE RAILROAD COMPANY'S POWER OF ALIENATION. PRIOR TO MAY 25, 1920 (41 STAT. 621), THE RAILROAD COMPANY HAD NO POWER TO ALIENATE LONGITUDINAL STRIPS OF THE RIGHT OF WAY ACQUIRED BY CONGRESSIONAL GRANT.

Here, as in the brief in support of petition, we treat specifications 2 and 3 of the errors assigned; that is the erroneous conclusions (a) that the police power of the state extends to the appropriation of longitudinal strips of railroad right of way granted by special act of Congress; and (b) that such strips might be acquired by adverse user. The state court rests its opinion on the issue of police power in part upon several federal decisions involving highway *crossings* of the railroad right of way, which, of course, are not in point (R. 127, fol. 194). The opinion of the state court also claims authority upon the issue of police power upon the case of *North Coast Railway v. Northern Pacific Railway Company,* 48 Wash.; 94 Pac. 113 (R. p. 128, fol. 194) but the *North Coast-Northern Pacific case* does not purport to establish a rule governing right of way titles fully vested under special federal grant prior to the Act of March 3rd, 1875. The ruling is not out of harmony with what we have quoted from the *Sinking Fund Cases* and from *Railway v. Alling* and *United States v. Denver & Rio Grande Railway.* The Northern Pacific Railroad Company

claimed under the special right of way grant of July 2nd, 1864 (13 Stat. 365), but the right of way involved in that case was in a narrow defile, known as "Union Gap", owned by certain Indians, and was expressly regarded by the Supreme Court of Washington as not subject to the right of way grant until ceded by the Indians in 1885. The Supreme Court of Washington has to say upon this point (94 Pac. 113):

> "That portion of the right of way here in question lies within said reservation, and was not a part of the public lands within the meaning of the said act of Congress, which the United States could then absolutely grant. The reservation thereof to the Indians, therefore, remained in force until the year 1885."

This decision was long before the rule established by this court in *Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442, and *Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, to the effect that the right of way granted by the Act of 1862 was effective in Indian reservations. Whether the reasoning of the Supreme Court of Washington was sound or not under the circumstances of that case, it is clear that the court rested its decision upon the assumption that the right of way did not take effect in Union Gap until the year 1885. If the special grant of July 2nd, 1864, did not take effect *in praesenti*, it did not take effect at all (*Leavenworth etc. Ry. Co. v. U. S.*, 92 U. S. 733, 748-749), and the Northern Pacific Railway Company had to look to subsequent federal authority for its right of way

through Union Gap. The court may well have assumed, as did this court in the *Alling* case, *supra*, that any federal authority granted subsequent to the Act of March 3rd, 1875, was conferred in view of that grant and subject to its limitations.

The late Judge Rudkin of the Ninth Federal Circuit was a member of the Supreme Bench of Washington when the *North Coast-Northern Pacific case* was decided. It was he who rendered the decision in the eastern district of Washington in the case of *Holland Co. v. Nor. Pac. R. R. Co.*, 208 Fed. 598, 603. That case denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes. The opinion declares, page 603, that the power of the railroad company to dispose of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state. Conversely, the police power of the state cannot extend beyond the power of the railroad company to give its voluntary consent, because both propositions are limited in the same degree by the same federal restriction. Nowhere in the federal statutes prior to May 25, 1920 (41 Stat. 621) can be found any authority for the alienation for highway purposes of any portion of a railroad right of way granted by special act of Congress.

On appeal of the *Holland case* to the Circuit Court of Appeals for the Ninth Circuit (214 Fed. 920) the appellate tribunal considered the authorities uphold-

ing ways laid out *across* the right of way, and held at page 926:

> "But in no substantial sense do these considerations apply to the case of a street or other highway laid out along, instead of across, the right of way. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use."

The opinion in the instant case justifies the longitudinal encroachment upon the theory that a crossing under present conditions may well be a much "greater burden" (R. p. 130, fol. 196). The rights of the public under the police power are not measured by the yardstick of *public convenience,* but rather of *public necessity.* It is absolutely necessary that the public may pass from one side of the right of way to the other; it is not necessary that the public should have the freedom of the roadbed longitudinally. The highway need not follow the canyon bed; the railroad *must.*

The opinion comments that appellants do not allege in the complaint "that the existence of said highway ever has interfered with the operation of their railroad, or their program of railroad expansion, nor that it is likely to do so in the future" (R. p. 131, fol. 197). An allegation of that character would be out of place inasmuch as that is a question of law settled by Congress itself. *"By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."* (*Nor. Pac. R. R. Co. v. Smith,* 171 U. S. 261, 275.)

Taken literally this language would conclude the court regardless of the purpose for which an adverse right be claimed. If it be conceded that this language is elsewhere qualified, still the opinion does not even suggest power of alienation or liability to loss by adverse user of longtitudinal portions of right of way for public purposes. Under the *Interstate Commerce Act,* section 1 (Subdv. 18), a common carrier may not alienate or abandon any part of its property for any purpose without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity will not be prejudiced.

The Supreme Court of California has long recognized the principle clearly expressed by the Supreme Court of the United States that a railroad right of

way is itself a public highway of a special and restricted nature. In *Southern Pacific Company v. Hyatt,* 132 Cal. 240, 242, 243, the state court quotes from *Olcott v. Board of Supervisors,* 16 Wall. 678, saying:

> "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence."
>
> * * * "It is said that railroads are not public highway *per se;* that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such."

The same case quotes with approval (page 244) the general rule declared in Jones on Easements:

> "Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership and the only practical assertion of title that can be made. If the public has used paths by the side of the rail-

road track for any length of time, the use must be considered as permissive, and not adverse. (Citing a long list of authorities from different states; Jones on Easements, sec. 281, p. 232.)"

This permissive use of portions of railroad rights of way not immediately required for railroad use is recognized and held not to be prejudicial in many federal cases. It is so expressed in the *Holland* case, *supra*, and again in *Barnes v. Southern Pacific Company* and *Mulvihill v. Southern Pacific Company*, 16 Fed. (2nd) 100, 104:

"Congress has not authorized the disposition of unused portions of the right of way. The power of the railroad company to alienate, as well as the power of others to acquire, any part thereof, is measured, not by what can be spared from railroad uses, but by what is required to meet such needs of the public or of individuals as fall within the scope of the principle already discussed. Privileges conferred by revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control."

Again in *Williams, Mayor et al. v. Atlantic Coast Line R. Co.*, 17 Fed. (2nd) 17, 21, it is said that the law does not require a railroad in order to preserve its right of way, to act the dog in the manger and churlishly refuse to allow the public to use a portion of its right of way for a street or road where such portion

is not then needed. The court in that case enjoined the town of Mullins, South Carolina, from laying hard surface paving on portions of a street within the railroad right of way, notwithstanding the fact that there was in that case no legal restriction on the company to convey or dedicate, and the city had used the street for half a century (page 21). The court approved the rule, page 20, that no right could be acquired by the town by prescription, and on page 21, that there was no element either of estoppel or abandonment presented by the circumstances.

In *Heilbron v. St. Louis S. W. Ry. Co. of Texas*, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613):

> "To hold that the mere use by the public, without objection, of a portion of a railway right of way, and continued during the statutory period of limitation, or for twenty years, would cause the railway company to lose the use of its property which it may need for legitimate purposes connected with its operation, would cause unutterable confusion and bring about in this state a condition of affairs which would seriously interfere with railway traffic. A railroad is itself a public highway, constructed and operated for the public benefit, and some courts have gone so far as to hold that a right by prescription, or limitation, cannot be acquired against a railroad to any portion of its right of way. Southern P. Ry. Co. v. Hyatt, 54 L. R. A., 522; Northern P. Ry. Co. v. Smith, 171 U. S., 260; Jones on Easements, sec. 281, and authorities cited in note. There are many portions of railway tracks and rights of

way, especially around and near depots in cities and large towns, where the public use the right of way for passing to and fro continuously, and where such use has been kept up in some cases far beyond the period of time necessary to create an absolute easement—yet no court in this state has ever treated such persons, when injured while using the railway right of way, as more than licensees."

IV.

THERE WAS NO FEDERAL GRANT OF COUNTY HIGHWAYS PRIOR TO THE RIGHT OF WAY GRANT OF JULY 1, 1862, NOR UNTIL FOUR YEARS THEREAFTER. IN THE MEAN TIME THE 400 FOOT STRIP WAS GRANTED BY CONGRESS AND DEDICATED TO THE PUBLIC SERVICE OF A RAILROAD RIGHT OF WAY. THE WAY USED PRIOR TO JULY 1, 1862, WAS NEVER ADOPTED BY THE COUNTY OF ALAMEDA.

To argue that no public highway existed through the pass of Niles Canyon prior to the right of way grant of July 1, 1862, does not imply that those who may have had occasion to travel through Niles Canyon were trespassers on the public domain. On the other hand, to concede that these occasional travelers passed through the canyon as a matter of right is not an admission that the privilege was absolute or anything more than a license by the federal government. The highway grant of July 26, 1866, is explicit in terms and purpose: "The right of way for the construction of highways over public lands, *not reserved for public*

uses, is hereby granted" (R. S. Sec. 2477; U. S. C. A. Title 43, Sec. 932). It is not necessary to dwell upon the familiar interpretation of the term *"hereby granted"*. The right of way would vest whensoever the public agency, state or county, should adopt a road over public lands; provided, however, that the lands were not at the time of adoption of the road "reserved for public uses". While a right of way appropriated prior to July 26, 1866, may be assumed to have vested on approval of the grant, that could not be where the chosen route had, as here, previously been granted by Congress, or reserved for public uses.

The opinion below recognizes the lack of congressional authority for the county highway through Niles Canyon. The court quotes from *Town of Red Bluff v. Walbridge,* 15 Cal. App. 770, and says (R. p. 124, fol. 192):

> "As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and the policy was crystallized into a statute passed on the 26th day of July, 1866."

The court below refers to the Niles Canyon highway as a way of necessity (R. p. 121). The doctrine of ways of necessity is foreign to the facts, there being

no privity or other relation whatsoever between the railroad company and the county. Fundamentally the rule is exactly as applied by the United States District Court for the Southern District of California in *United States v. Rindge et al.*, 208 Fed. Rep. 611, 619:

> "What is commonly called a right of way from necessity arises when the owner of a tract of land conveys a portion thereof to another and there is not access from a public highway to the part so conveyed except over the remaining lands of the grantor, or a stranger, or when the owner sells a portion of his land and the part remaining is inaccessible except over the land sold or that of a stranger."

The opinion in that case briefly analyzes the effect of the congressional grant for highway purposes (Id.):

> "By public statute Congress has granted rights of way for the construction of highways over public lands not reserved for public use. Act of Congress July 26, 1866, c. 262, 14 Stat. at L. 253. Beyond this and the full protection of the title which it confers, it would seem that the government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired."

The court says further on the same page, denying the theory of a way of necessity:

"The logical result of this contention is that a way is reserved by implication for the use of such persons over all land granted by the government to reach the remaining subdivisions when there is no other reasonable or convenient means of access, notwithstanding there is no such reservation in the grant, and there is no public law so providing."

Nor is it a fact that the topography of Niles Canyon offers any serious obstacle to modern highway construction. We may look to the opinion itself for the statement that in 1910 or thereabouts the county found it practical "to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way" (R. p. 120, fol. 189). This court may judicially know what is matter of common knowledge, that highway engineers today are not balked by mountains or canyons, and are governed as much by scenery as by facility of construction. In fact it is not unusual in highway construction in the hills to forego established routes in the beds of canyons for shorter, more practicable and more scenic routes at higher levels.

The record is conclusive that the line adopted by the board of supervisors of Alameda County in 1859 is north of Alameda Creek throughout its entire distance through the canyon. It is equally conclusive

that the way traveled was on both sides of the creek and in considerable part in the bed of the creek. The Geological Survey of the Pleasanton Quadrangle in 1904 shows four crossings near the westerly end of the canyon which are not shown to have any relation to the route described by the three witnesses from personal recollection. These four crossings shown on the topographic sheet certainly have no relation to the route adopted in 1859 and shown on Defendants' Exhibit B (R. p. 60A, fol. 98a). Only one of the crossings used in 1904 is apparently in the same location as at present (Plaintiffs' Exhibit 6 (p. 40A, fol. 70a)). Naturally those seeking passage through the canyon in the early period, when no improved way existed, followed the route of easiest travel, largely in the bed of the creek when that was possible. When the water was high they remained at home or sought another way out. Under our statute travel through the canyon by few or by many did not constitute the route of travel a public road. The California Statute of April 26, 1858, provides, in section 1, that:

> "All roads in the counties of Tuolumne and Alameda shall be considered as public highways, which are now used as such, and have been declared such by order of the court of sessions or board of supervisors, or which may be declared such hereafter, by the board of supervisors within their respective counties; *provided,* that nothing in this act shall apply to any incorporated city or town within the counties named."

The route adopted by the board of supervisors was never opened, and the way used was never adopted.

> "Public highways are such only as come within the express provisions of the statute declaring them to be such, and that roads established without authority of law, for the convenience of individuals, are without any legal status either as public highways or as private ways."
>
> *Tucson Consolidated Copper Co. v. Reese* (Ariz.), 100 Pac. 777, 778.

The foregoing is typical of the many decisions upon that familiar issue, not a few of which are collated under the note to section 932 of Title 43 U. S. C. A. We think it unnecessary to pursue the argument upon this well established rule.

This principle, coupled with the undisputed and indisputable line of route for road No. 247 in 1859, *entirely north of Alameda Creek,* renders wholly nugatory any oral testimony to the contrary. It also destroys the effect of the words of the State Supreme Court (R. p. 122, fol. 191):

> "The record shows beyond question that all of the proceedings for the establishment of a public highway from Niles to Sunol were taken by the county and completed long before the enactment of the Pacific Land Grant Act of 1862 and consequently long prior to the time the railroad acquired any rights whatever in the canyon."

If we assume, with the State Supreme Court, that the County acquired a highway route as exhibited on the plat of survey (Defendants' Exhibit B, R. p. 60A, fol. 98a), that would not carry the further right to shift the location at pleasure or convenience. The rule is recognized in California, as in other jurisdictions, and as expressed in *Felsenthal v. Warring*, 40 Cal. App. 119, 125-126:

> "The acquisition of a right of way over one portion of a person's land, whether by grant or prescription, gives the grantee no right over any other portion. It is entirely immaterial that the new line was only from twenty-five to forty feet distant from the old line. It was upon the property of appellant, over which respondents had no right whatever, and the principle is the same as if the new line had been hundreds of feet away from the old one. (Vestal v. Young, 147 Cal. 715, (82 Pac. 381).)"

In conclusion, the practical importance of a decree for petitioners as prayed lies in this: that in case of need for improved alignment, or expansion of facilities, or as a measure of safety, the railway company should have the unquestioned power to require a shifting of the highway to a new location. The railroad company requires present assurance that the rights and privileges granted by Congress may be exercised in full performance of the public service contemplated by the grant, and this whenever it may become expedient, and without the danger of being

blocked by dilatory and stubborn resistance on the part of the county, causing long and costly delays, and incidentally impairing or effectively defeating any plan of railroad improvement or expansion.

It is respectfully submitted that the decision of the Supreme Court of the State of California is contrary to the applicable decisions of this court and to established law upon all grounds here urged, and that said decision should be reversed with instructions to enter judgment for petitioners as prayed in their complaint (R., p. 7, fols. 12-13).

Dated San Francisco, November 13, 1931.

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